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No. 10-1054

In the
Supreme Court of the United States

CITY OF CINCINNATI, MILTON R. DOHONEY, JR., AND JOEL KOOPMAN,
Petitioners,

v.

MARK MILLER, COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES, AND WEDEMANDAVOTE.COM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit erred in applying the deferential abuse of discretion standard to the district court's issuance of a preliminary injunction based on the likelihood that respondents will ultimately prevail in this case under this Court's public forum doctrine.

II. Whether, based upon the limited and preliminary record developed solely for consideration of the issuance *vel non* of a preliminary injunction, the Sixth Circuit erred in concluding that the government-speech doctrine was not applicable when Petitioners allowed speeches and political rallies by other private organizations in certain areas of a public building.

III. Whether the Sixth Circuit erred in applying the deferential abuse of discretion standard to the district court's issuance of a preliminary injunction based on the likelihood that respondents will ultimately prevail in this case based upon the void-for-vagueness doctrine.

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INTRODUCTION

The Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit sought by Petitioners City of Cincinnati, Milton R. Dohoney, Jr., and Joel Koopman. There is no conflict amongst the circuit courts or any conflict with this Court's precedent. Furthermore, there was also no error below, as the District Court applied the correct law with respect to issuing the preliminary injunction and the Sixth Circuit appropriately concluded the issuance did not constitute an abuse of discretion. This case has proceeded only so far as the issuance of a preliminary injunction and, thus, resolution of all the factual and legal issues is not final. All that has been resolved has been the Respondents' likelihood of success and the appropriateness *vel non* of the issuance of preliminary relief.

STATEMENT OF THE CASE

Since at least 1997, various private individuals and organizations have participated in speech-related events and activities within certain specific areas within Cincinnati City Hall. Up until September 9, 2008, the participation of these private individuals and organizations in such events or activities was purportedly pursuant to the then-existing Administrative Regulation #5 (referred herein as "Old Administrative Regulation #5"). Old Administrative Regulation #5 formally set forth Cincinnati's longstanding policies regarding the use of the City's public buildings, including Cincinnati City Hall.

Adopted and promulgated by the Cincinnati City Manager in February 1997, Old Administrative Regulation #5 provided, in part, that:

> No private business enterprises or solicitations should be permitted in City buildings or operated therefrom. Exceptions should be made only by specific approval of the Department Head when it is judged to be in the public interest, as in the case, for example, of the United Way Campaign.
>
> No private signs or advertising materials should be displayed on or in City buildings unless for an approved public purpose authorized by the Department Head.
>
> . . .
>
> In making any exceptions to the above policies, Department Heads are urged to consider not only what is proper, but also how it appears to the public.

Since the adoption of Old Administrative Regulation #5, numerous meetings, conferences, rallies and other uses involving private individuals and organizations have occurred in certain specific areas within City Hall. These spaces, *i.e.*, the spaces inside of City Hall which are at issue in this case, are: (i) the lobby and first floor staircase; (ii) conference room 115; and (iii) council chambers and related committee meeting rooms.[1] In its opinion granting the Plaintiffs'

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[1] Notwithstanding the limited nature of the areas at issue in this case, the City conveniently fails throughout the Petition to recognize or acknowledge the specific areas at issue in this case, *i.e.*, those fora that the City has made available to private individuals or groups exercising their political free speech rights

motion for a preliminary injunction, the District Court recognized and extensively summarized some of the many uses to which the spaces at issue in this case had been used.[2]

Without belaboring or repeating the numerous and various uses cataloged by the District Court in issuing the preliminary injunction, the District Court, in assessing the type of forum at issue in this case "closely examine[d]" the past practice of the City with respect to these spaces.[3] In so doing, the District Court "note[d] that a variety of events have been held [in these areas of City Hall] by independent individuals and organizations who are not City officials. These events were open to the public, and

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inside City Hall. Instead, in no fewer than 19 times in the Petition, the City uses the term "workplace" in an apparent effort to mislead this Court to believe that the Plaintiffs lawsuit is about providing access to every nook and cranny of City Hall, *e.g.*, the private offices of individual council members. Despite the City's effort to create such a misleading impression, that is not what this case is about. For it is important to appreciate that parts of a government building or property may be categorized as one type of forum while other parts of the same building or property may be a different type of forum. *See Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008)(in challenge to denial of advertising within Defense Department newspaper, advertising section was the proper forum for consideration and not the entire newspaper); *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir. 2007)("the Judge Executive's office, and not the building in general, is the relevant forum"); *ACT-UP v. Walp*, 755 F. Supp. 1281, 1287 (M.D. Pa. 1991) (making a distinction between the gallery of the House chamber versus the rotunda).

[2] Petition, App. B, at 38a – 40a.

[3] Petition, App. B, at 55a.

were only related to the exercise of the rights and responsibilities of the City officials in the most general sense. . . . *It is clear that City officials use the interior of City Hall however and whenever they desire, without regard to any limitations.*"[4]

As developed below, two of the most pronounced examples of the way that spaces inside of Cincinnati City Hall were utilized without any limitations involved (i) a press conference and rally in support of a school levy which was held in the interior front lobby and steps within the City Hall, and (ii) the use of a conference room for a press conference by a private organization at which no City official designated as having approved the event either spoke at or even attended the event.[5]

In late 2007 or early 2008, the Cincinnati Public School Board[6] voted to place on the ballot at the primary election of March 4, 2008, an emergency operating levy for the Cincinnati Public Schools.[7] This issue was to appear on the ballot as Issue 10.[8] The School Levy Rally came about when representatives of

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[4] Petition, App. B, at 55a – 56a (emphasis added).

[5] It is noteworthy that these two events occurred during the same time frame that Plaintiffs sought access to the inside of City Hall for its press conference and rally which gave rise to this lawsuit.

[6] Under Ohio law, the board of education is a public body entirely independent from the Cincinnati City Council and is not an agency of the City

[7] Petition, App. D ¶68, at 97a.

[8] Petition, App. D ¶68, at 97a.

the Issue 10 campaign contacted an aide in the office of a councilmember about using the front lobby and interior first floor staircase of City Hall for the School Levy Rally.[9] Specially, Jan Leslie of the private group Cincinnatians Active to Support Education ("CASE") talked with an aide to a councilmember about arranging the School Levy Rally by simply inquiring whether the aide could "set this up?"[10] At no time did Ms. Leslie specifically seek the "sponsorship" of the Rally by the councilmember.[11] In fact, in arranging the School Levy Rally, the council member's aide simply described the event as follows: "the [pro-Issue 10] levy campaign would like to hold a press conference . . . on the first floor of City Hall, using the inside foyer and steps."[12] The City allowed the proponents of the school levy to hold the School Levy Rally in the front lobby and on the interior first floor

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[9] Petition, App. D ¶37, at 90a.

[10] Petition, App. D ¶¶37 & 69, at 90a & 97a.

[11] Petition, App. D ¶38, at 90a.

[12] Petition, App. D ¶39 & Exh. U, at 90a. In advance of the School Levy Rally, Ms. Leslie of CASE circulated an e-mail calling upon people to "Join supporters on the steps of City Hall (inside) to announce your group, organization and individual support for Issue 10." (Petition, App. D Exh. F-1.) And in a post-event press release which was not issued by the City, but, rather, by the private group CASE, the clear communicative nature that the venue of such a press conference has: "Standing on the steps inside City Hall, dozens of supporters urged school district voters to support the passage of Issue 10 . . . ." (Petition, App. D ¶7a & Exh. F-4, at 73a.)

staircase of City Hall, with the City even providing the podium and microphone used for the Rally.[13]

At the School Levy Rally, one of the speakers was Pamela Green of the private organization Parents for Public Schools of Greater Cincinnati. During her political speech, Ms. Green led the individuals who had assembled on the interior first floor staircase of City Hall in chanting the slogan "Yes on 10, for our children".[14] In addition to Ms. Green, other speakers at the Rally and Press Conference included Ms. Leslie of CASE, Mark G. Turner of CASE, Rosa Blackwell who was the Superintendent of Cincinnati Public Schools, Rev. Richard Bollman of the AMOS Project, and Rev. James Pankey who was the president of the Baptist Ministers Conference.[15]

In light of the City's on-going policy of opening certain areas inside of City Hall for advocacy by private groups or individuals on ballot issues or otherwise, Plaintiffs sought to have access comparable to that provided to other private individuals and

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[13] Petition, App. D ¶¶ 39 & 41, at 90a & 91a. Article XIII, Section III of the Cincinnati City Charter explicitly provides that "no monies of the City of Cincinnati . . . may be disbursed to any . . . political action committee, . . . or may be expended for the purpose of advocating . . . the passage or defeat of any ballot issue." (R. 28 ¶74.) Thus, any efforts undertaken by the City in support of the passage of Issue 10 could not be considered governmental speech by the City. Yet, "[t[he City maintains that the [School Levy Rally] was consistent with its policies in effect at that time as to the use of the interior spaces of City Hall." (Petition, App. D ¶45.)

[14] Petition, App. D ¶70, at 97a.

[15] Petition, App. D ¶71, at 97a.

groups, including the private group advocating passage of the school levy. At the time, Plaintiffs had been engaged in an initiative petition effort seeking to amend the Charter of the City of Cincinnati to prohibit the implementation of an automated photo-monitoring program to enforce claimed violations of City traffic laws.[16]

On April 28, 2008, counsel for the Plaintiffs wrote to the Cincinnati City Manager asking to have "a press conference and rally" in "exactly the same location" as the School Levy Rally.[17] This press conference would have been to promote the petition drive relating to the photo-monitoring program. Despite the fact that the City had previously opened and made spaces inside of Cincinnati City Hall for political speech by private individuals and groups, the City denied Plaintiffs access to the same venue that they had allowed those in support of the school tax levy to use for the School Levy Rally. In a letter dated April 29, 2008, the City's facilities manager, Joel Koopman, rejected the Plaintiffs' request, claiming that (i) Old Administrative Regulation #5 governed Plaintiff's proposed use, and (ii) the use of any City facility was purportedly for conducting business related to the functions of the City's various departments and by City Council in the performance of their duties.[18]

The only reason that Plaintiffs' proposed use of specific spaces inside of Cincinnati City Hall for their

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[16] Petition, App. D ¶72, at 98a.

[17] Petition, App. D ¶25 & Exh. P, at 87a.

[18] Petition, App. D ¶26 & Exh. Q, at 87a.

desired event was not permitted was because the Plaintiffs had not received an entirely subjective blessing from one of the 130 City officials who were authorized to permit such an event. But neither Mr. Koopman's letter nor Old Administrative Regulation #5 provided any guidelines or criteria to such City officials or to Plaintiffs as to when such permission would or should be granted and when it would or should be denied.[19]

As a result of the City's rejection of the Plaintiffs' request, Plaintiffs were relegated to hold their press conference *outside* of City Hall, a venue which diminished the communicative message, as well as the significance and symbolism in the Plaintiffs' press conference and rally.[20]

Despite relegating Plaintiffs to the outside of Cincinnati City Hall for their desired press conference and rally, the City amazingly allowed, about a month later, another press conference in one of the designated spaces *inside* of City Hall by a private

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[19] Additionally, when the City's facilities management receives a request from one of the 130 City officials who can sponsor events, such a request is acted upon under the assumption that the use would be for a "proper purpose" but no analysis or assessment is undertaken to confirm that the City official or employee is actually implementing official City business in so using the space. (Petition, App. D ¶35, at 89a.)

[20] Before the District Court, there was unrebutted expert testimony concerning the significant logistical, material, symbolic and communicative differences between holding an event in the interior of the City Hall versus outside. Additionally, such expert testimony also established the unique communicative purposes served by the specific areas at issue in this case.

group – this one by an organization known as Citizens for Community Values ("CCV"). CCV's request to hold a press conference inside of City Hall was made by contacting an aide to a member of City Council. The request by CCV simply asked to "use" a conference room; it did not seek the "sponsorship" of anyone with the City in order to hold the subject press conference.[21] And as a result of the request by CCV to "use" a conference room, the aide, in turn, simply requested the City's facilities management department to arrange such use.

Thus, on June 9, 2008, CCV held its press conference (the "CCV Press Conference") in conference room 115 of City Hall.[22] As with the School Levy Rally, the City provided the podium and microphone used by CCV for the press conference.[23] Furthermore, the councilmember whose aide arranged the use of the conference room was not present at the CCV Press Conference, and, in fact, no City official or employee even spoke at the press conference.[24]

In light of the City continuing to open certain areas inside of City Hall for advocacy by private groups or individuals (even when City officials were not present nor participating in such events), the Plaintiffs made a second request for similar use of such spaces. On July 17, 2008 (approximately a month after the CCV

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[21] Petition, App. D ¶19, at 92a.

[22] Petition, App. D ¶46, at 92a.

[23] Petition, App. D ¶53, at 93a.

[24] Petition, App. D ¶¶50 & 51, at 92a & 93a.

Press Conference), Plaintiff Mark Miller submitted a second request on behalf of the Plaintiffs to the City seeking, once again, to use space inside City Hall for a rally and press conference.[25] This second proposed rally and press conference would have been to announce and celebrate the turn-in of more than 14,000 signatures collected for the proposed amendment to the City Charter prohibiting the implementation of a photo-monitoring program by the City.

And despite having allowed numerous private individuals and groups to utilize spaces inside of City Hall for press conferences and rallies, including the recently held CCV Press Conference, the City once again denied Plaintiffs equal access to areas within City Hall comparable to that which the City had provided to other private individuals and groups.[26]

Due to the City's refusal, under the guise of implementing the City's policy under Old Administrative Regulation #5, to afford Plaintiffs access to certain spaces within City Hall (while allowing such access to other private organizations), as well as Plaintiffs' desire to engage in other public initiative efforts relating to the City (including press conferences and rallies inside of City Hall), Plaintiffs, on August 15, 2008, commenced this action, seeking injunctive and declaratory relief, together with nominal damages, arising from the violation of their First Amendment rights. Plaintiffs' claims were

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[25] Petition, App. D ¶27 & Exh. R, at 87a.

[26] Petition, App. D ¶28 & Exh. S, at 87a.

premised generally upon the following: (i) the First Amendment does not allow the government and its officials to discriminate in allowing certain private individuals or groups access to public property in order to engage in the exercise of political speech, while, at the same time, denying such access to others based solely upon whether such groups obtain the prior approval or support by governmental officials for such activities; and (ii) by requiring, without any criteria or, at best, generally vague standards, prior approval or sponsorship of a City official before any of the designated venues inside of City Hall will be made available for political rallies and press conferences by private individuals or groups, the City has imposed an unconstitutional prior restraint upon the Plaintiffs' exercise of their freedom of speech based upon unconstitutionally vague standards.

Three days after the commencement of this action, the District Court held a hearing on Plaintiffs' motion for a temporary restraining order. The District Court, in a 20-page opinion, concluded that:

> [Old] Administrative Regulation #5 suffers from vagueness. First, its prohibitive terms are not clearly defined. There is no guidance as to what constitutes being "in the public interest," save the lone example of "the United Way Campaign." Second, there are no clear standards which would guide a City official to enforce the Regulation. . . . As such, the Court finds that Plaintiffs are likely to succeed on the merits of their due process claim based upon the doctrine of vagueness.

Accordingly, the District Court restrained the City from applying Old Administrative Regulation #5. No appeal was taken from the issuance of the temporary restraining order.

Subsequently, on September 9, 2008, the City Manager promulgated a new regulation regarding the use of spaces inside City Hall, *i.e.*, New Administrative Regulation #5. This new regulation declared, in part, that:

> City Hall is lawfully for the purpose of allowing City officials to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati. . . .
>
> The interior spaces of City Hall are reserved for use by the Mayor, the City Manager and his assistants, City Councilmembers, City Department Directors, City Commissions and Boards, and City employees. The interior of City Hall is open to the public for purposes of visiting City offices and attending City Council and other public meetings. The interior of City Hall is not generally available to the public for other purposes.
>
> When the Mayor, the City Manager and his assistants, City Councilmembers, City Department Directors, and City Commissions and Boards intend to use interior spaces of City Hall for assemblages, they should notify the Facilities Management Division of the Public Services Department. . . .
>
> Facilities Management is responsible for insuring that the assemblage does not create security problems, unreasonably interfere with ingress or egress from City Hall, or otherwise

unreasonably interfere with the other official uses occurring inside City Hall.

In light of the issuance of New Administrative Regulation #5, Plaintiffs filed a Second Amended Complaint which contended, *inter alia*, that New Administrative Regulation #5 suffered from the same or similar constitutional infirmities as Old Administrative Regulation #5, *i.e.*, utilizing an arbitrary and capricious standard, and allowing the exercise of unbridled discretion by nearly 130 City officials in determining what private individuals or groups would be permitted to have access to and to utilize spaces inside of City Hall for, *inter alia*, press conferences and rallies.

Having already issued a temporary restraining order with respect to Old Administrative Regulation #5, the District Court considered Plaintiffs' motion for preliminary injunction based on the Second Amended Complaint and its challenge to New Administrative Regulation #5. Based upon all of the evidence before it regarding the uses of the pertinent spaces inside of City Hall, as well as the language and actual implementation of Administrative Regulation #5, the District Court concluded that the Plaintiffs demonstrated a likelihood of success such that a preliminary injunction should issue.[27] Specifically, the District Court found that the City's restriction on Plaintiffs' speech, through the implementation of Administrative Regulations #5, was not reasonably related to purposes of the various fora at issue. The District Court, thus, concluded that "the only clear

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[27] Petition, App. B, at 31a – 67a.

restriction on access to the interior of City Hall is sponsorship of a City official", but that "the sponsorship requirement is not reasonably related to the purpose of the forum. . . . The sponsorship requirement only minimally limits speakers and the topics to those related to the work of City officials."[28] And accordingly, the District Court concluded "that Plaintiffs have shown a likelihood of success on the merits of their First Amendment claim to the extent that it is based upon a facial challenge under the public-forum doctrine."[29]

Additionally, the District Court concluded that Plaintiffs demonstrated a likelihood of success on the merits when it concluded that New Administrative Regulation #5 was likely unconstitutionally vague: "the terms of Administrative Regulation #5 are not clearly defined. The only direction the Regulation provides is that the purpose of the interior of City Hall is to allow City officials 'to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati.' There are no clear standards that would guide a City official to judge whether a use fell within this specified purpose. As such, the Court finds that Plaintiffs are likely to succeed on the merits of their due process claim based upon the doctrine of vagueness."[30] And, thus, based upon the foregoing findings and conclusions, the District Court preliminarily enjoined the City from permitting or denying access to the interior of City Hall pursuant to

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[28] Petition, App. B, at 58a.

[29] Petition, App. B, at 58a.

[30] Petition, App. B, at 65a.

Administrative Regulation #5. This conclusion and its underlying bases were affirmed by a panel of the Sixth Circuit. The Petitioners' request for *en banc* review by the Sixth Circuit was denied with no member of the Sixth Circuit even requesting a poll.

ARGUMENT

In addition to rejecting the misdirected effort of the Petitioners to invoke the government speech doctrine by analogizing the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations by private groups, the Sixth Circuit also affirmed the District Court's granting of a preliminary injunction based upon two separate and independent grounds: Plaintiffs demonstrated a substantial likelihood of success in their challenge to New Administrative Regulation #5 (i) pursuant to this Court's free-speech public-forum doctrine; and (ii) based upon the lack of any meaningful guidance by which city council members and department heads would exercise the complete discretion given to them in selecting who they will allow to use space within Cincinnati City Hall.

Because these two grounds stand independent of one another to support the issuance of the preliminary injunction, Petitioners need to demonstrate that both grounds, *i.e.*, the forum analysis and the void-for-vagueness analysis, present sufficiently compelling reasons for this Court to grant the Petition. Otherwise, all this Court would provide would be an advisory opinion on a non-dispositive issue. But Petitioners have not presented sufficiently compelling reasons for review of any of the issues their Petition

asked this Court to decide. This Court should therefore decline their request that it undertake to repeat the Sixth Circuit's review of the district court's discretionary decision to issue a preliminary injunction.

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO REVIEW THE APPLICATION OF THIS COURT'S PUBLIC FORUM DOCTRINE AS IT CONCERNS THE ISSUANCE OF A PRELIMINARY INJUNCTION

In their effort to feign some circuit split on the reasonableness of government control over limited public fora or nonpublic fora, the Petitioners fail to acknowledge or appreciate that the reasonableness of such control "must be assessed in the light of the purpose of the forum *and all the surrounding circumstances*." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985)(emphasis added). For while "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity," this is true only "so long as the distinctions drawn are reasonable in light of the purpose served by the forum." *Id.* at 806; *accord Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001).

An assessment of the reasonableness of government control over limited public fora or nonpublic fora is, by nature, a fact-intensive inquiry. Yet, the Petitioners proceed from the mistaken premise that resolution of the question of such reasonableness may occur in a vacuum. But in this case, both the District Court and the Sixth Circuit properly assessed the facts that were

developed for consideration of the issuance *vel non* of a preliminary injunction and that were specifically applicable to the use of particular areas within Cincinnati City Hall. In so doing, both Courts concluded that the sponsorship requirement of Administrative Regulation #5 is likely to be found constitutionality deficient. As the District Court stated:

> the Court finds that the sponsorship requirement is not reasonably related to the purpose of the forum. The stated purpose of the forum is to allow City officials [to] exercise their rights and responsibilities under the City Charter. The sponsorship requirement only minimally limits speakers and the topics to those related to the work of City officials.

And the Sixth Circuit similarly recognized that the Administration Regulation #5 lacks a reasonable relation to the claimed purposes of the fora at issue:

> . . . the remaining issue is whether the requirement [that private individuals or organizations seeking to engage in rallies and press conferences inside of Cincinnati City Hall obtain the sponsorship or collaboration of certain city officials] is reasonably related to the purpose of the forum. The stated purpose of the forum is to allow city officials to exercise their rights and responsibilities under the City Charter. But, *Administrative Regulation #5 permits authorized officials to open spaces in city hall to private parties for events that they do not attend or assist in organizing*. As a result, *the sponsorship or collaboration requirement, as*

> *drafted, bears little relationship to any official duties under the City Charter*. We therefore hold that the district court did not abuse its discretion in concluding that plaintiffs have shown a likelihood of success on the merits of their facial First Amendment challenge to the sponsorship requirement under the public forum doctrine.

Every public forum case involves different fora each with their own distinct characteristics and purposes, different regulations, and different justifications for the challenged regulations and limitations. *See, e.g., Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)("[b]ecause forum analysis involves fact-specific concerns, courts have reached divergent conclusions regarding the status of municipal stadiums"). The foregoing conclusions by both the District Court and the Sixth Circuit were premised based upon the specific facts developed for consideration of the issuance *vel non* of a preliminary injunction vis-à-vis certain specific areas inside of Cincinnati City Hall.

In ignoring that forum analysis involves fact-specific concerns, the Petitioners posit a one-size-fits-all reliance upon other public fora cases in an effort to convince this Court to grant the Petition. Yet, in the cases to which Petitioners rely, the fora, the regulations governing the fora, and the putative justification for such regulations are distinctly different than that involved in this case. In *Del Gallo v. Parent*, 557 F.3d 58 (1st Cir. 2009), the challenged regulation barred election campaigning on sidewalks located on post office property, not certain areas within a city hall. In *Del Gallo*, the First District recognized "that a politically neutral government entity's interest

in avoiding the appearance of political entanglement is a valid justification for limiting speech in a non-public forum," id. at 73, and, thus, the regulation at issue was reasonable in light of the purpose of the forum. But in this case, the Petitioners do not contend that Administrative Regulation #5 is designed to avoid the appearance of political entanglement; in fact, undisputedly political activity is permissible within the areas of Cincinnati City Hall, it just depends upon whether one has the a blessing from one of the 130 City officials who were authorized to sponsor or arrange for such an event.[31]

Similarly, in *American Civil Liberties Union v. Mote*, 423 F.3d 438 (4th Cir. 2005), the Fourth Circuit concluded that the fora at issue, *i.e.*, areas of a college campus, were limited public fora devoted to the mission of public education that focused on the students and other members of the university community. This conclusion was arrived at after "[e]xamining the circumstances of this case," *id.* at 444, not simply through *ipse dixit* as the Petitioner would have the courts do in this case.[32] In the present

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[31] And the most blatant example of purely political activity within Cincinnati City Hall was the School Lævy Rally by various private individuals and organizations with the pep-rally chanting of "Yes on 10, for our children".

[32] The Petitioners appear to believe that the City's "stated purpose" of the fora at issue, i.e.,"to allow City officials to exercise their rights and responsibilities under the city Charter" is somehow irrefutably dispositive. (Petition, at 15.) But that is not accurate. *See Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 251 (3d Cir. 1998) ("[t]he [government's] own statement of its intent, however, does not resolve the public forum question"); *Air Line Pilot's Ass'n, Inc. v. Dep't of Aviation*, 45 F.3d 1144, 1153-54

case, a review of the opinions of both the Sixth Circuit and the District Court reveal that, while both courts recognized what the City of Cincinnati was declaring the purpose of the fora to be, the actual facts developed to date belied such a declaration which, in turn, supported both courts' conclusion that such regulations were not reasonably related to the purpose of the fora. As the District Court concluded:

> The Court notes that a variety of events have been held by independent individuals and organizations who are not City officials. These events were open to the public, and were only related to the exercise of the rights and responsibilities of the City officials in the most general sense. The City official who sponsors an event is not required to be present at the event, and is often not present. It is clear that City officials use the interior of City Hall however and whenever they desire, without regard to any limitations. The current version of Administrative Regulation #5 does nothing to alter this practice.

Thus, the present case clearly falls within the ambit of that which *Mote* recognized could not be done, even on the college campus at issue in *Mote*: "once a limited forum has been created, entities of a 'similar character' to those allowed access may not be excluded." *Mote*, 423 F.3d at 444 (quoting *Warren v. Fairfax County*, 196 F.3d 186, 194 (4th Cir. 1999)). While the City of Cincinnati may try to self-servingly declare and

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(7th Cir. 1995) (government's stated policy is not dispositive with respect to the government's intent in a given forum).

attempt to constrain the purpose of the fora at issue, the record of actual use of the fora developed for consideration of the issuance *vel non* of the preliminary injunction led both the District Court and the Sixth Circuit to conclude otherwise.

Furthermore, the Sixth Circuit appreciated that "[t]his Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664 (2004)(quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 336 (1985)(O'Connor, J., concurring). Thus, "[i]f the underlying constitutional question is close, . . . [this Court will] uphold the injunction and remand for trial on the merits." *Id.* at 664-65; *accord Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975)("while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion. While we regard the question as a close one, we believe that the issuance of a preliminary injunction . . . was not an abuse of the District Court's discretion").

And while Plaintiffs do not believe that the underlying constitutional question is even a close call, the highly deferential standard afforded to decisions of district courts to issue *vel non* preliminary injunctions only further demonstrates the lack of compelling reasons for this Court to grant the Petition.

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO FURTHER AND MORE BROADLY EXPAND THE CONCEPT OF GOVERNMENT SPEECH AT THE EXPENSE OF THE PUBLIC FORUM DOCTRINE

As the Sixth Circuit's opinion correctly noted, the Petitioners raised its government-speech argument for the first time on appeal, notwithstanding that the concept and application of the government-speech doctrine was established prior to the commencement of this case and, thus, could have been raised in the District Court. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)("the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny"). This notwithstanding, the Sixth Circuit proceed to considered (and reject) the Petitioners' government-speech argument in light of this Court's recent decision in *Pleasant Grove v. Summum*, 555 U.S. ___, 129 S.Ct. 1125 (2009).

As this Court recognized in *Summum*, "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.* at ___, 129 S.Ct. at 1132. Petitioners' mere disagreement with the Sixth Circuit's tentative application of *Summum* to a unique, and not fully developed, set of facts fails to justify Petitioners' request that this Court review the issuance of the preliminary injunction on this issue. Instead of waiting until the record on the application

of the "recently minted government speech doctrine"[33] is fully developed in this case through full discovery and a trial, the Petitioners seek to have this Court rapidly expand the government speech doctrine based upon the limited record submitted to the District Court for purposes of the hearing on the preliminary injunction. For the parties themselves expressly declared that they did not "waive the right to conduct additional discovery following [the preliminary injunction] hearing." Moreover, the record was not developed with a view to presenting the facts needed to resolve the City's government-speech defense, as that defense was not asserted by Petitioners in the District Court. Thus, it is clearly premature for this Court to consider the application *vel non* of the government speech doctrine at this stage of the proceedings. As Justice Souter cautioned in *Summum*, "it would do well for [this Court] to go slow in setting [the government speech doctrine's] bounds, which will affect existing doctrine in ways not yet explored."[34]

In seeking to greatly expand the government speech doctrine through this case, the Petitioners wrongly declare that "[t]he predominant concepts in *Summum* are identical to those in this case."[35] But in making such a argument, as well as unendingly relying upon *Summum*, the Petitioners are doing exactly what this Court in *Summum* expressly

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[33] *Summum*, 555 U.S. at ___, 129 S.Ct. at 1139 (Stevens, J., concurring).

[34] *Summum*, 555 U.S. at ___, 129 S.Ct. at 1141 (Souter, J., concurring).

[35] Petition, at 22.

rejected, *i.e.*, attempting to "analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations."[36]

Review of Petitioners' government-speech claim is particularly unwarranted at this time because the development of what constitutes government speech versus simply enabling private speakers is appropriately, and relatively consistently, being developed by the circuit courts. *E.g.*, *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)(factors to assess whether speech is government or private include: "(1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech"); *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008)("[w]e therefore adopt the Fourth Circuit's four-factor test . . . to determine whether messages . . . constitute government or private speech"); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008)(the "'multi-factor test [approach of the Fourth and Ninth Circuits] can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party? Factors bearing on this analysis include, but are not limited to, the degree

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[36] *Summum*, 555 U.S. at ___, 129 S.Ct. at 1137.

to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message"); *see also Summum*, 555 U.S. at ___ 129 S.Ct. at 1142 (Souter, J., concurring)("the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige").

The Sixth Circuit's conclusion that Respondents are likely to prevail on this issue is fully consistent with these decisions. Based on the record before the Sixth Circuit, there was ample support for the view that the speech of other groups that had been permitted in City Hall could not have been understood by reasonable observers to be attributable to the government. This Court should proceed slowly and with caution in expanding the bounds of the government speech doctrine, especially, in a case that lacks a fully developed record. The circuit courts are adequately developing the scope and limits of the doctrine. Accordingly, at this time and based on the limited and preliminary record, this Court should deny the Petition.

THE PETITIONERS HAVE NOT ESTABLISHED SUFFICIENTLY COMPELLING REASONS FOR THIS COURT TO REVIEW THE APPLICATION OF THE VOID-FOR-VAGUENESS DOCTRINE TO THE ISSUANCE OF THE PRELIMINARY INJUNCTION

The First Amendment forbids laws that give public officials unbounded discretion to regulate speech.

Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-33 (1992). A law is unconstitutionally vague when, *inter alia*, it lacks definitive standards for those who apply or enforce the law such that the potential exists for arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). For the exercise of discretionary decisions by public officials must be guided by "narrow, objective, and definite standards." *Forsyth County*, 505 U.S. at 130; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969). Such requirements are especially stringent in the context of free speech because vague language and undue discretion allow officials to discriminate against certain viewpoints. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 763-64 (1988); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). And, in this case, the Sixth Circuit appropriately and properly applied such well-established standards in the review of the District Court's issuance of a preliminary injunction.

In seeking to have this Court review the Sixth Circuit's decision with respect to the void-for-vagueness doctrine, the Petitioners simply indicate their displeasure or disagreement with the conclusion reached by the Sixth Circuit.[37] Lacking from the argument of the Petitioners is "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ." S.Ct. Rule 14(h). The Petitioners do not even posit that the Sixth Circuit's decision with respect to the void-for-vagueness

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[37] Petition, at 24 ("the Sixth Circuit misapprehended and misapplied the void for vagueness standard").)

document is "in conflict with the decision of another United States court of appeals on the same important matter," S.Ct. Rule 10(a), or that the Sixth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. Rule 10(c).

Other than disagreeing with the decision of the Sixth Circuit (and the District Court), the Petitioners simply raise a brief and passing question as to whether the void-for-vagueness principle should be applicable in nonpublic fora.[38] But in questioning whether the void-for-vagueness principle should be applicable in a nonpublic forum, the Petitioners do not identify or contend the existence of a split amongst the circuit courts. As the Federal Circuit rightfully acknowledged in *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), "several cases from our sister circuits [] have struck down standardless licensing schemes in nonpublic fora." *Id.* at 1323;[39] *see Child*

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[38] Petition, at 25.

[39] Petitioners wrongly contend that the Federal Circuit in *Griffin* "expressed skepticism" as to whether a void-for-vagueness could even be applicable in a nonpublic forum. (Petition, at 25 n.42.) However, no such skepticism was expressed. Instead, the Federal Circuit simply recognized that "no Supreme Court decision attempts to apply the unbridled discretion doctrine in the context of a nonpublic forum." *Griffin*, 288 F.3d at 1322. Then, after recognizing that other circuit courts have applied void-for-vagueness analysis in nonpublic fora, the Federal Circuit did likewise, though recognizing that "greater latitude ought to be accorded to government officials in nonpublic fora." *Id.* at 1323. Thus, contrary to the contention or suggestion of the Petitioners,

Evangelism Fellowship of Maryland v. Montgomery County Pub Sch., 457 F.3d 376, 386 (4th Cir. 2006)("[a]lthough the Supreme Court has not yet had occasion to apply the unbridled discretion doctrine outside the context of a traditional public forum, the dangers posed by unbridled discretion – particularly the ability to hide unconstitutional viewpoint discrimination – are just as present in other forums. Thus, there is broad agreement that, even in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment"); *Atlanta Journal & Constitution v. City of Atlanta Dep't. of Aviation*, 322 F.3d 1298, 1310-11 (11th Cir. 2003); *Lewis v. Wilson*, 253 F.3d 1077, 1079-80 (8th Cir. 2001).

The Petitioners' disagreement with the District Court's and the Sixth Circuit's application of the void-for-vagueness doctrine (as well as the decisions from the other circuit courts that also apply the doctrine to nonpublic fora) does not rise to the level of a significantly compelling reason for this Court to grant the Petition in order to review the issuance of the preliminary injunction.

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the Federal Circuit in *Griffin*, like other circuit courts, directly applied the void-for-vagueness doctrine in nonpublic fora; it (like the other circuits) simply was more deferential to government officials than they would be if the forum was a public forum. It is also important to recognize and appreciate that the fora at issue in this case, pursuant to the factual findings of the District Court, are limited public fora, not nonpublic fora.

CONCLUSION

The Petition fails to establish any justification for this Court to review the District Court's issuance of the preliminary injunction. There is no true conflict among the circuits nor any conflict with this Court's precedent. The Petition should be denied so that a full record may be developed through discovery and trial.

Respectfully submitted,

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